No. 05-730

In The Supreme Court of the United States

MICHAEL HERRING, in his official capacity as Commonwealth's Attorney for the City of Richmond, and WADE A. KIZER, in his official capacity as Commonwealth's Attorney for the County of Henrico,

Petitioners,

v.

RICHMOND MEDICAL CENTER FOR WOMEN, and WILLIAM G. FITZHUGH, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Virginia, Robert F. McDonnell, on behalf of Michael Herring, in his official capacity as Commonwealth's Attorney for the City of Richmond, and Wade A. Kizer, in his official capacity as Commonwealth's Attorney for Henrico County (collectively "Virginia"), submits this Reply Brief in Support of the Petition for a Writ of Certiorari.

As *Ayotte v. Planned Parenthood,* 126 S. Ct. 961 (2006), demonstrates, the lower court erred when it invalidated Virginia's statute on its face. Thus, at a minimum, this Court should grant certiorari, vacate the judgment, and remand for further proceedings in light of *Ayotte*. *See National Abortion Fed'n v. Gonzales*, ___ F.3d ___, ___, 2006 WL 225828 at *1 (2nd Cir. 2006) (deferring ruling on the issue of remedy until after supplemental briefing concerning the impact of *Ayotte*).[1] However, while *Ayotte* made it clear that the court of appeals' remedy is improper, *Ayotte* failed to resolve the two fundamental questions on which this Court granted certiorari. Those questions remain worthy of this Court's review and this Petition remains an ideal vehicle for resolving both issues. Thus, this Court should grant certiorari to resolve the questions presented. In the alternative, this Court should grant, vacate, and remand for further proceedings consistent with *Ayotte*.

[1] Of course, the Ninth Circuit found it unnecessary to remand in light of *Ayotte* and, instead, simply declared that Congress preferred allowing all partial birth abortions to banning most partial birth abortions. *See Planned Parenthood Fed'n of America, Inc. v. Gonzales*, ___ F.3d ___, ___, 2006 WL 229900 at *17-20 (9th Cir. 2006). The Ninth Circuit's conclusion is unfounded and represents a fundamental misunderstanding of *Ayotte*.

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER FEDERAL COURTS MAY ALLOW OVERBREADTH CHALLENGES TO ABORTION STATUTES.

Review should be granted to determine whether federal courts may allow facial challenges alleging overbreadth to abortion statutes.

Contrary to the assertions of Dr. Fitzhugh, this Court has never *explicitly* held that facial challenges alleging overbreadth of abortion statutes are permitted. *See National Abortion Fed'n,* ___ F.3d at ___, 2006 WL 225828 at *12-13 (Walker, C.J., concurring).[2] Indeed, this Court has explicitly applied the "no set of circumstances" test set forth in *United States v. Salerno,* 481 U.S. 739, 745 (1987) in the abortion context. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (statute requiring parental notification). *See also*

[2] As Chief Judge Walker explained:

> There may be adequate reasons for suspending *Salerno's* "no set of circumstances" test in the field of abortion – including possibly a concern that, under the *Salerno* standard, it would be difficult for a woman to bring an as-applied challenge under exigent circumstances. But the Supreme Court has never told us what has happened to the *Salerno* doctrine in the abortion context; it has never balanced the jurisprudential and administrative considerations associated with jettisoning *Salerno* against whatever medical concerns might militate in favor of a modified standard of proof. More importantly, the Court has never considered whether [*Planned Parenthood v.*] *Casey* or *Stenberg* struck the appropriate balance. Perhaps a better standard can be articulated – one that requires a regulation's challenger to make an affirmative showing of proof regarding the way in which women will be adversely affected by the challenged abortion regulation. Instead, the Court has sanctioned a mode of constitutional analysis that permits the lower courts to invalidate an abortion regulation based upon a speculative showing that the challenged provision *might* work an unconstitutional result.

Id. at ___, 2006 WL 225828 at *12 (Walker, C.J., concurring) (emphasis original; footnotes and citations omitted).

Webster v. Reproductive Health Servs., 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring) (statute prohibiting use of public facilities for performing abortions). Because this Court has never explicitly addressed the issue, it is not surprising that the Circuits are divided on the question of whether the federal courts may allow facial challenges alleging overbreadth to abortion statutes.[3] While there is language in some recent decisions of this Court *suggesting* that facial challenges alleging overbreadth are permitted in the abortion context, new constitutional standards cannot be created by "dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Cmty. Coll. v. Katz*, 126 S. Ct. 990, 996 (2006).

The conflict among the Circuits and the irrelevance of dicta from previous decisions supported this Court's grant of certiorari in *Ayotte*. Yet, *Ayotte* failed to resolve the

[3] The Fifth Circuit has held that such challenges are not permitted. *See Barnes v. Moore,* 970 F.2d 12, 14 n.2 (5th Cir. 1992). *See also Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-04 (5th Cir. 1997) (declining to reverse *Barnes*). Moreover, prior to its opinion in *this* case, the Fourth Circuit refused to allow facial challenges alleging overbreadth in the abortion context. *See Greenville Women's Clinic v. Bryant*, 317 F.3d 357, 362-63 (4th Cir. 2004) (*Greenville Women's Clinic II*); *Greenville Women's Clinic v. Bryant,* 222 F.3d 157, 164-65 (4th Cir. 2000) (*Greenville Women's Clinic I*); *Manning v. Hunt*, 119 F.3d 254, 268-69 (4th Cir. 1997). However, other Circuits have concluded that facial challenges alleging overbreadth are permitted in the abortion context. *See Planned Parenthood v. Heed,* 390 F.3d 53, 58 (1st Cir. 2004), *cert. granted sub nom. Ayotte v. Planned Parenthood,* 125 S. Ct. 2294 (2005); *Planned Parenthood v. Farmer,* 220 F.3d 127, 142-43 (3rd Cir. 2000); *Planned Parenthood v. Lawall,* 180 F.3d 1022, 1025-26 (9th Cir.), *amended on denial of reh'g,* 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich,* 130 F.3d 187, 193-97 (6th Cir. 1997); *Jane L. v. Bangerter,* 102 F.3d 1112, 1116 (10th Cir. 1996); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1456-58 (8th Cir. 1995). *Cf. A Woman's Choice-East Side Women's Clinic v. Newman,* 305 F.3d 684, 687 (7th Cir. 2002) (treating the *Salerno* standard as merely a "suggestion" in the abortion context).

issue. *See National Abortion Fed'n*, ___ F.3d at ___, 2006 WL 225828 at *13 (Walker, C.J., concurring) ("The Court, however, chose not to address the most controversial issue before it – the quantum of proof necessary to bring a facial challenge to an abortion regulation.").[4] This Petition presents an ideal vehicle to resolve the question. Certiorari should be granted.

II. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE CONSTITUTION REQUIRES A HEALTH EXCEPTION.

This Court should also grant review to determine whether the Constitution imposes a *per se* rule that a health exception must be included in any statute that regulates partial birth abortion, partial birth infanticide, or similar procedures.[5]

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[4] Although *Ayotte* severely restricts the ability of federal courts to invalidate an abortion statute on its face, the issue of whether federal courts may entertain facial challenges alleging overbreadth in the abortion context remains critically important. At its core, the overbreadth doctrine involves questions of standing – who may challenge a particular statute. *See Virginia v. Hicks,* 539 U.S. 113, 120 (2003). In general, a person may challenge a statute as it applies to their own conduct, but "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767 (1982). Thus, unless a litigant actually violates the statute at issue, the litigant may not challenge that statute. However, the general rule gives way in a few limited situations where the overbreadth doctrine applies. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-13 (1973). In those limited contexts, a litigant may vindicate the rights of others even though the litigant himself may not have violated the statute at issue.

The distinction is critical in abortion cases. If facial challenges alleging overbreadth are not permitted, then the litigant challenging an abortion statute must demonstrate that he actually engages in conduct that violates the abortion statute at issue. In contrast, if facial challenges alleging overbreadth are permitted, then no such limitation exists.

[5] Of course, this issue is presented by the Petition in *Gonzales v. Carhart*, No. 05-380, which this Court considered at its Friday, February 17

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Contrary to the assertions of Dr. Fitzhugh, *Stenberg v. Carhart,* 530 U.S. 914 (2000) did not *explicitly* establish a health exception requirement as a *per se* constitutional rule. While there is language in *Stenberg suggesting* such a *per se* rule, a new constitutional rule cannot be created by "dicta in a prior case in which the point now at issue was not fully debated." *Katz*, 126 S. Ct. at 996. Indeed, some judges have read *Stenberg* more narrowly. *See App.* at 28 (Niemeyer, J., dissenting). As Judge Straub explained:

> [U]nder my reading of *Stenberg,* the ultimate issue remains the necessity of D & X in preserving women's health, to be determined based on substantial medical authority. Where there is a division of medical opinion *and* credible medical explanations supporting both sides of that division, that level of uncertainty indicates a risk to women and requires a health exception. *Stenberg, however, did not set down an immutable ban on the passing of a statute banning D & X without a health exception or suggest that the division of medical opinion alone could require such an exception.*

National Abortion Fed'n, ___ F.3d at ___, 2006 WL 225828 at *18 (Straub, J., dissenting) (emphasis added; citations omitted). In any event, this Court should clarify whether the Constitution establishes a *per se* requirement of a health exception and, if not, exactly when a health exception is required. *See National Abortion Fed'n*, ___ F.3d at ___, 2006 WL 225828 at *13 (Walker, C.J., concurring).[6]

Conference. If this Court chooses to grant review in *Gonzales*, it should either hold this Petition pending the outcome of *Gonzales* or should grant review and schedule argument for the same time that Gonzales is argued.

[6] As Chief Judge Walker observed:

> The standard announced in *Stenberg* is rendered all the more questionable when one considers that the constitutional provision that the Court invoked to strike down Nebraska's statute

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Although this Court granted certiorari in *Ayotte* to resolve that issue, the issue remains unresolved. This Petition is an ideal vehicle for resolving the question. Certiorari should be granted.

III. AT A MINIMUM, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH *AYOTTE*.

If this Court determines that it is inappropriate to grant certiorari on one or both questions presented, then this Court should grant, vacate, and remand for further proceedings consistent with *Ayotte*.

When a federal court is confronted with a statute that is constitutional in some circumstances, but not in others, federal courts should not choose "the most blunt remedy – permanently enjoining the enforcement of [the statute] and thereby invalidating it entirely." *Ayotte,* 126 S. Ct. at 969. Rather, federal courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force," or "sever its problematic portions while leaving the remainder intact." *Id.* at 967. *See also United States v. Booker,* 543 U.S. 220, 227-29 (2005) (mandating severability); *United States v. Raines,* 362 U.S. 17, 20-22 (1960) (enjoining unconstitutional applications). Although the judiciary must not "rewrite state law to conform it to constitutional requirements," *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988), judges must recognize that "[a] ruling of unconstitutionality frustrates the

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> – the Due Process Clause of the Fourteenth Amendment – has generally been interpreted as a restraint on arbitrary government action. The Supreme Court should tell us what it is about abortion cases that necessitates an exception to this rule.

National Abortion Fed'n, ____ F.3d at ___, 2006 WL 225828 at *13 (Walker, C.J., concurring).

intent of the elected representatives of the people." *Regan v. Time, Inc.,* 468 U.S. 641, 652 (1984) (White, J., joined by Rehnquist, C.J., & O'Connor, J., announcing the judgment of the Court). Therefore, judicial remedies are limited to enjoining unconstitutional applications unless "consistency with legislative intent requires invalidating the statute *in toto.*" *Ayotte*, 125 S. Ct. at 969.

If the Constitution establishes a *per se* rule that a health exception is required, then the Virginia Act is unconstitutional in those circumstances where: (1) the mother's health is in danger; *and* (2) the Act's life exception does not apply.[7] In all other circumstances, Virginia may prosecute physicians who perform partial birth infanticides.[8] Assuming that such circumstances exist[9] and

[7] Of course, Virginia contends that the Constitution does not establish a *per se* rule of a health exception requirement. To the extent that *Stenberg* imposes such a requirement, *Stenberg* "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

[8] Of course, if the Virginia Act is unconstitutional as applied to some circumstances, there will be criminal prosecutions where the physician claims that the Virginia Act is unconstitutional as applied to him. As with any claim that a statute is unconstitutional as applied to a criminal defendant, the issue will have to be decided on a case-by-case basis and often will turn on particular facts.

[9] Virginia contends that this is a null set. *See National Abortion Fed'n,* ____ F.3d at ___, 2006 WL 225828 at *12 (Walker, C.J., concurring) ("Congress had before it substantial evidence that, even if the D & X procedure is wholly prohibited, a woman can obtain a safe abortion in almost every conceivable situation."). There are no circumstances where the mother's health is in danger, but her life is not threatened.

Indeed, Dr. Fitzhugh concedes that in the case of a vertex or headfirst delivery where the fetus is delivered intact and substantially outside the mother's body, it is not necessary to kill the fetus to protect the health of the mother. *App*. at 41 (Niemeyer, J., dissenting). Moreover, Dr. Fitzhugh concedes that in the case of a breech or feet first delivery, there is generally no need to kill the fetus to protect the health of the mother. It is only the rare circumstance where the head becomes lodged in the cervical os, which "poses a threat to the mother's *life*, and to abate that risk, Dr. Fitzhugh

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assuming that Dr. Fitzhugh may challenge the Virginia Act,[10] then the proper remedy is to enjoin Virginia from prosecuting physicians who perform partial birth infanticides when the mother's health is at risk, but her life is not. This is the only permitted remedy unless it can be shown that the Virginia General Assembly would prefer *allowing all* partial birth infanticides to *banning most* partial birth infanticides. *Ayotte,* 126 S. Ct. at 968 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").

In an attempt to avoid a grant, vacate, and remand, Dr. Fitzhugh argues that the Virginia General Assembly would prefer *allowing all* partial birth infanticides to *banning most* partial birth infanticides. This argument defies logic and completely ignores Virginia law regarding the significance of legislative history and the presumption of severability. *See Department of Treasury v. Fabe*, 508 U.S. 491, 509-10 (1993) (When a state statute is challenged in federal court, state law controls on the issue of severability.). Quite simply, legislative history –

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prefers to crush the skull of the fetus and then remove it." *App*. at 43 (Niemeyer, J., dissenting). In this circumstance, however, Dr. Fitzhugh concedes that the mother's life would be at risk and thus covered by the Act's life exception such that no health exception is required. *App.* at 44 (Niemeyer, J., dissenting). In any event, the existence of such circumstances is an issue for remand.

[10] If federal courts are required to entertain facial challenges alleging overbreadth in the abortion context, then Dr. Fitzhugh may challenge the Virginia Act regardless of whether he actually performs partial birth infanticides under any circumstances. However, if federal courts may not entertain facial challenges alleging overbreadth, then Dr. Fitzhugh must demonstrate that he actually performs partial birth infanticides in circumstances where the mother's health is threatened, but her life is not. Outside of the overbreadth context, a litigant "may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *Ferber*, 458 U.S. at 767.

subcommittee reports, committee hearings, floor statements, and a Governor's suggested amendments – are not considered by the Virginia courts. *See Williams v. Virginia,* 576 S.E.2d 468, 470 (Va. 2003). Rather, Virginia's courts "determine the General Assembly's intent from the words contained in the statute." *Id.* Moreover, by enacting *Virginia Code* § 1-243,[11] "the Virginia legislature has stated clearly that courts are now to apply a presumption of severability. . . ."[12] *Sons of Confederate Veterans, Inc. v. Commissioner of the Dep't of Motor Vehicles*, 288 F.3d 610, 627 (4th Cir. 2002). In any event, the issue of what Virginia law provides with respect to legislative history and severability is an issue for remand. *See Virginia v. Black*, 538 U.S. 343, 367-68 (2003) (directing Supreme Court of Virginia to consider severability of statute on remand).

Therefore, at a minimum, this Petition should be granted, the judgment vacated, and the matter remanded to the lower courts for reconsideration of the remedy consistent with *Ayotte*.

[11] The provision states in part, "[t]he provisions of acts of the General Assembly or the application thereof to any person or circumstances that are held invalid shall not affect the validity of other acts, provisions, or applications that can be given effect without the invalid provisions or applications." *Virginia Code* § 1-243.

[12] Moreover, the Supreme Court of Virginia has emphasized:

> Severability, as codified in § [1-243], is a rule of judicial construction of statutes. As such, the possibility of severance cannot be waived by a party to a suit by failure to raise it. Rather, it is the duty of the Court, faced with a constitutional challenge to a statute, to consider *sua sponte* whether an invalid portion of a statute may be severed to permit the continued operation of the constitutional portion of the statute. The Court cannot be forced to accept a flawed construction of a statute or prevented from saving a statute from invalidity simply because of an oversight or tactical decision by one or both of the parties."

Elliott v. Virginia, 593 S.E.2d 263, 268 (Va. 2004).

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for a Writ of Certiorari should be **GRANTED.** In the alternative, this Court should **GRANT, VACATE, AND REMAND** for further proceedings consistent with *Ayotte*.

Respectfully submitted,

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